



**SCOTTSDALE BOARD OF ADJUSTMENT
KIVA - CITY HALL
3939 N. DRINKWATER BOULEVARD
September 3, 2003
6:00 PM
APPROVED MINUTES**

PRESENT: James Vail, Chair
Terry Kuhstoss, Vice Chair
Jennifer Goralski, Board Member
Carol Perica, Board Member
Norman Sands, Board Member
Neal Waldman, Board Member
Laurel Walsh, Board Member

STAFF: Janis Villalpando
Kurt Jones
Alan Ward
Keith Niederer

CALL TO ORDER

The regular meeting of the Scottsdale Board of Adjustment was called to order by CHAIR VAIL at 6:00 p.m.

ROLL CALL

A formal roll call confirmed members present as stated above.

ADMINISTRATIVE ITEMS (portions in italics are verbatim)

1. Vote to reschedule the October 2003 hearing from October 8th to October 1st.

CHAIR VAIL: *The reason for this is that on October 8, this room is not available, and I understand that the only available space in the City for a*

public meeting is a very small facility which would probably seat the maximum of 15 people, which would cover the Board Members and staff. I also understand that there may be a couple of members who could not attend if the meeting is moved to October 1st. But it is on the agenda, and I will entertain a motion.

VICE CHAIR KUHSTOSS: *I move that we change the date for October to October First.*

BOARD MEMBER SANDS: *I second the motion.*

Discussion:

BOARD MEMBER WALSH: *At Study Session we had asked if perhaps there were any alternative dates that might be acceptable to enable a larger attendance by Members of the Board, and Staff was going to check in the interim.*

CHAIR VAIL: *Yes, we did check, and there are no other dates.*

MS. VILLALPANDO: *I believe we have a couple of comment cards from the public that relate to this issue, and some more information on dates from Staff.*

CHAIR VAIL: *Very good. I will hear from Staff.*

MR. JONES: *Mr. Chairman, in looking at the room availability for the Kiva, the next available date would be October 23. So that's a week prior to your November hearing. There was discussion about the room being available on October 9, however we have found it is not. So if the motion is to change the meeting date to October 1, the room will be open. If the meeting date remains on the 8th, it will have to be a remote site, and will not be live.*

BOARD MEMBER WALSH: *Is there any way to ascertain if other facilities that do have television capabilities, such as the Center for the Performing Arts or some other room, would be available?*

MR. JONES: *At this time we don't have an updated calendar for all of the surrounding facilities. I think we will be able to tape wherever we end up. The Planning Commission would be the live feed that night, and the Board meeting would be taped and played at a later date.*

CHAIR VAIL: *Hearing all of that information -- and I think one of the concerns is that we are conscious of having the meetings shown live and adequately*

taped. There are some facilities available for meetings that are not available for videotaping. Is there any further discussion on the motion?

BOARD MEMBER WALSH: *I just realized that I also will not be able to attend on October 1st, so that will bring it to four Board Members.*

CHAIR VAIL: *That's not a good issue, just four members.*

MS. VILLALPANDO: *We would be able to videotape really anywhere. We would use a backup. It would not be a live feed, but a tape, and it would be broadcast later, as we broadcast this twice a week. And we have two public comments on the floor.*

LARRY LAZARUS: *I wrote a letter indicating that I was not going to be available on the 1st, and I am representing several neighbors. I will tell you more about that when we get to agenda item number four. I am very concerned because this is an issue that several people are involved in and are concerned about. I am concerned, one, that they have proper representation at the hearing, wherever that hearing is, and two, and more importantly, if there are only four members, I would be very concerned that we would have an opportunity before a full Board. If not a full Board, at least a substantial number of you. As I said, there are a great many people here very interested in this case, and we would like to have the opportunity to have a fair hearing in front of the majority of the Board at an appropriate date. By the way, I did talk to Ms. Lagarde, who is representing Mr. Constantine, who is the appellant, because if there is an appeal, I think this just got kicked up to you. If he is the appellant, she represents him, and she is okay with the date of the 8th. She didn't know that you did not have an available room. And she subsequently left, so at least both sides don't have a problem with pushing it back to the 8th.*

CHAIR VAIL: *The reason for the unavailability on the 8th is that the Planning Commission has the room on the second and fourth Wednesday of each month. Our meeting schedule is the first Wednesday following the first Tuesday, which oddly enough puts us in conflict with the Planning Commission. My concern about not moving the date is the small room and the potentially large number of attendees at that meeting. There would not be access for these people. There is a motion on the floor. Is there further discussion?*

BOARD MEMBER WALSH: *I think that since, with this large concern, Staff can look more aggressively to a larger facility. Is the theater being used? The main auditorium might be overkill on room, but there certainly has to be a room, although it might be overkill, that would be available for every body to have a fair hearing and to have adequate seating.*

MR. JONES: *If the Board votes to keep the meeting on the 8th, we will do our best to find a facility that best fits the situation for this Board. We have exhausted a lot of these suggestions, but we will do our best to get a facility for whatever night is chosen.*

CHAIR VAIL calls for the vote.

BOARD MEMBER SANDS and Board Member Kuhstoss vote in favor of the motion. CHAIR VAIL and Board Members, Perica, Walsh, Goralski, and Waldman voted "Nay".

CHAIR VAIL: *The meeting will remain on October 8th.*

MINUTES APPROVAL

1. August 6, 2003

BOARD MEMBER SANDS MOVED FOR APPROVAL OF THE AUGUST 6, 2003 MINUTES AS SUBMITTED. BOARD MEMBER WALSH SECONDED THE MOTION.

BOARD MEMBER KUHSTOSS noted that she had not been present for the August 6 meeting, but expressed concern as to the verbiage relative to the change from a 28 to 26 foot height. She stated that the case should have been withdrawn or evidence presented as to a material change. Ms. Villalpando explained that the Board had granted a continuance, which according to the rules of the Board was the applicant's privilege. She added that no proof of material change was necessary to grant a continuance.

CHAIR VAIL called for the vote.

THE MOTION PASSED UNANIMOUSLY BY A VOTE OF SEVEN (7) TO ZERO (0).

2. Discussion and vote to consider scheduling a site visit and demonstration at the property located at 8755 E Dixileta Drive (7-BA-2003).

CHAIR VAIL: *Would anyone like to begin the discussion of this consideration of scheduling a site visit? The appellant would like the Board to actually hear for themselves what the use constitutes the helipad or go-cart racing, and rather than doing seven separate demonstrations, as the Board always visits each site, they would like us all to gather together as a Board. The problem with this is that when all of us meet, or four or more*

meet together, it constitutes a quorum and must be noticed as a meeting. The second problem is finding a date that all seven of us, or a quorum, are available.

BOARD MEMBER KUHSTOSS: *I think we all agree that we need to do this on a weekend in order for us all to go together. So unless there's a change in activities, days versus weekend....*

BOARD MEMBER WALSH: *In fairness to the Applicant, I am quite sure we haven't had something like this administratively but there perhaps has to be a dialogue between ourselves and the Applicant to see if we can't find a mutually acceptable date in the discussion where we can at least give the applicant the opportunity to have a majority of us, four or more. Because for us to say philosophically "yes", and we vote for it and then can't find a date that works, then I think the whole discussion is rather moot. And I don't know if there's any problem with us talking and exchanging information with the Applicant, as far as what date might work and when we think we can all make it.*

MS. VILLALPANDO: *Board Member Walsh, the Board needs to avoid ex parte communication, and I would rely on our very competent Staff to set up a handful of days that work for the bulk of the people involved.*

BOARD MEMBER WALSH: *Aiming for October 8th^t, the day we have to post from here forward, by the time we have a dialogue and exchange, we may not have the ability to orchestrate the event.*

MS. VILLALPANDO: *We are posting because we will err on the side of public notice, so we would select dates that give enough time, and we would follow the normal notice procedures that exist in the rules.*

BOARD MEMBER WALSH: *Then philosophically, we are only going to vote to say, yes, we are going to do so and advise Staff to proceed.*

MS. VILLALPANDO: *Yes.*

CHAIR VAIL: *Is there a motion to schedule a site visit working with Staff?*

MS. VILLALPANDO: *We have public comment on the floor.*

MR. LAZARUS: *I represent Linda Dean, Jim Heitel, and Gordon Zuckerman, as well as other neighbors in the particular area, but those three are adjacent and near this property. We have a concern about the demonstration and let me put this on the record. We will work with staff, by the way, in order to make sure that this is a fair demonstration as long*

as we are involved in it, and we hope to be, the demonstration of the racetrack that exists, as well as the landing and taking off of a helicopter that exist on this property. And let me talk about the racetrack first. We want to make sure that: number one, that motorized vehicles of the same size and type that have been historically used on the property will be used at the demonstration. And Mr. Constantine has indicated that that is an Indy style motorized racing vehicle used on international carting foundation certified racing tracks. So, we wanted to make sure that the proper vehicle is being used, number one, that it be driven at the speeds that have been historically done on the property, that it will be done in a racing situation – because they do race on this property - that two or more vehicles will be racing at the same time – I guess that constitutes a race, doesn't it - so we are actually creating the same situation that exists, or potentially could exist, depending upon what your interpretation might be when we actually come to you before the 8th. And that notification be provided to us, being myself and those three neighbors, at least, when the demonstration will occur and that we have an opportunity to attend. Again, I would be more than happy to work with staff, but I want to make sure that the parameters of this demonstration are accurately representing what has existed, but what the potential might be if this racetrack were interpreted to be an ancillary use to a low-density residential area.

Lastly, we would ask that you not have a demonstration of helicopter landing and takeoff. And the reason we are asking that is because when the last demonstration did occur – actually these are all horse properties all around this property, there was an accident that did occur – there was a lady almost thrown from her horse, and it does create a dangerous condition. We will be presenting that information to you on the 8th. And the reason I am bringing this up today is that I just don't want to have a demonstration that could cause an issue of that nature again. Helicopter taking off and landing in a residential area does create some hazard, and I think that we can present this information to you on the eighth; both sides without having you see a helicopter take off and land.

CHAIR VAIL: *I think as the City Attorney pointed out, it would be noticed as a public meeting and would certainly... yourself and the neighbors would be available to be there. We wouldn't have a Board discussion on it, but certainly following that you could present at the Board meeting, and you could certainly present an argument, "Oh that is not how it normally runs, or that's not the type of car they normally use", but it would be a public hearing and you would receive notice. I also have a comment card from Mr. Andy Moore.*

ANDY MOORE, Earl Curly and Lagarde, 3101 N. Central Suite 1000, Phoenix, Arizona. Ms. Lagarde apologizes for her absence. She was here for the Study Session, but had a neighborhood meeting scheduled for a long time that was being attended by all the press and she needs to be there this evening, and so asked me to read a statement to the Board regarding the issue of going out to the site. And we are reading this to preserve rights that we believe we have if this case were later to come to some sort of litigation in the form of a letter given to Staff today. We had asked that it be given to you, but I understand it was not, so I will read it regarding case number 7-BA-2003.

(See Attachment One)

MS. VILLALPANDO: Chair Vail and Commissioners, the issue before you today is a narrow one, and it is an evidentiary issue. And that is whether or not you should go to the site and hear the helicopters and see a racetrack demonstration. The issue before you, you cannot, the issue that's not before you is the one we just spoke of continuing to a different date. That is what this speaker just addressed. I would instruct you all to disregard any remarks concerning jurisdiction and the merits of that. That is a much broader matter. This is an evidentiary question, and is one that the Chairman alone could make; it doesn't have to be made in a public meeting. So please disregard the inappropriate public comments and be mindful to narrow the issue when you are considering it and make the motion.

CHAIR VAIL: We are all aware that we are simply voting to consider scheduling a site visit, which will be done in discussion with the attorneys and City Staff. And try to find a conducive date. I will entertain a motion.

VICE CHAIR KUHSTOSS: I move that we visit the site as a group, and at a mutually agreeable time with the Members of the Board and the Applicant. **BOARD MEMBER SANDS** seconded the motion. The motion passed unanimously by a vote of seven (7) to zero (0).

BOARD MEMBER WALSH: As to the specifics of the demonstration, we heard from Mr. Lazarus as to what would be demonstrated. Is that decision to be left with Staff?

CHAIR VAIL: I would say it would be. There's nothing prohibiting helicopter takeoff and landing at this point. It was merely a request by the law firm to not have the helicopter demonstration.

MS. VILLALPANDO: I can't speak for Mr. Lazarus, but I think his request was that the Board not ask the property owner to demonstrate

the takeoff and landing of a helicopter. The Board, and again the Chairman alone has the power to make evidentiary scope type decisions, and that could be something that the Board could decide together, that the chairman could make the call for, or in conjunction with staff. It could be coordinated with the property owner and in consideration of the concerns, notice the meeting, just like we would including posting the property etc.

CHAIR VAIL: *I think I will wait until the appropriate time until the potential meeting is set, and I can listen to the discussion and decide whether or not it will be necessary and prudent to have the helicopter takeoff and landing.*

CONTINUANCES

4. **7-BA-2003 (Zoning Interpretation Appeal)** an appeal of the Zoning Administrator's interpretation responding to a June 4, 2003 letter requesting an interpretation on the property located at 8755 E. Dixileta Drive zoned Single Family Residential, Environmentally Sensitive Lands, Foothills Overlay District (R1-190 ESL/FO).

MR. JONES: *The amended agenda does say 10-1-03, and you should when the motion is made, make sure that you state October 8, 2003.*

BOARD MEMBER WALSH moved to continue case 7-BA-2003 to the October 8, 2003 meeting. **VICE CHAIR KUHSTOSS** seconded the motion. The motion passed unanimously by a vote of seven (7) to zero (0).

REGULAR AGENDA

5. **5-BA-2003 (Waxman / Morrision Property Variance)** request by Marcia D. Morrison, applicant/owner, for a variance to allow an 18 foot front yard setback along 64th Street in lieu of the required 30 foot setback located on a 17,268 +/- sq ft parcel located at 6402 E. Calle del Paisano.

MR. NIEDERER presented the case per the staff packet. He reviewed the chronology of the case from the first hearing on January 8, 2003, subsequent abandonment of Sixty-Fourth Street by the City of Phoenix, and determination of a material change by the Board.

MR. NIEDERER responded to Board Member questions. Vice Chair Kuhstoss asked if the abandonment by the City of Phoenix was final, and whether any appeal rights existed. Mr. Niederer replied that the

documentation had been recorded with the Maricopa County Recorder and that no appeal rights remained.

CHAIR VAIL explained the function of the Board of Adjustment and the constraints placed upon the Board by State law. He also explained the format for applicant testimony and public comment.

MS. MARCIA MORRISON addressed the Board. She noted that with the abandonment process complete, the lot dimensions have changed by ten feet and that her property now exceeds the side yard requirement. Ms. Morrison referred to six of the sixteen corner lots in the subject area, and noted that those six had all made the improvements that she was requesting; some through a variance process and several simply through obtaining a building permit. She noted the support from her neighbors, and a letter from the City of Phoenix indicating that they have no plans to widen Sixty-Fourth Street. She also called attention to the fact that the Sixty-Fourth Street side serves as a side yard for all the homes in the area, although Scottsdale's zoning describes the area as front yard.

(Chair Vail opened public comment.)

DAVID FOGLER, 6322 East Calle del Paisano, spoke in favor of the applicant's request, citing the benefits to improving an older neighborhood.

MS. CAROLINE COMO, 6332 Calle del Paisano, also spoke in support of the variance request. She stated that the entire neighborhood was in favor of the proposed improvements by the applicant, and pointed out that the street address and front door are on Calle del Paisano and that the Sixty-Fourth Street side is composed of garages and side yards.

CHAIR VAIL requested an explanation from staff as to the rationale for the designation of front yard for the Sixty Fourth Street frontage. Mr. Niederer replied that the zoning ordinance as written, states that the front yard set back would be measured from the street with the narrowest street fronting, which in this case is Sixty-Fourth Street, which is just slightly shorter than Calle del Paisano.

(Chair Vail asked for Board discussion.)

BOARD MEMBER PERICA commended the applicant for coming before the Board for the variance, and stated that she felt all four criteria had been satisfied.

BOARD MEMBER SANDS concurred.

VICE CHAIR KUHSTOSS agreed that the four criteria had been met and stated that the front yard situation should be viewed in the context of what exists on the property. She also noted that, with the abandonment, the 15-foot setback has been exceeded.

BOARD MEMBER WALSH commended the applicant for her patience and tenacity in following due process. She also expressed delight in the improvements being made to the Arcadia neighborhood. Board Member Walsh recalled that she had initially suggested the abandonment process as a remedy for the applicant and was very pleased with the outcome.

BOARD MEMBER WALDMAN also commended the applicant for her patience.

BOARD MEMBER GORALSKI supported the views of her fellow Board Members.

BOARD MEMBER WALSH moved to approve the variance request to allow an eighteen-foot front yard set back along Sixty-Fourth Street in lieu of the required thirty-foot set back located on the parcel of the applicant located at Calle del Paisano. In other words, I am moving to approve the variance request for item 5-BA-2003. **BOARD MEMBER PERICA** seconded the motion. The motion passed unanimously by a vote of seven (7) to zero (0).

6. **6-BA-2003** (Khalaj Residence) applicant/owner, for a variance from the 24-foot height restriction to allow a 26-foot ridgeline on a property located at 12670 E Cochise Drive with Single Family Residential, Environmentally Sensitive Lands zoning (R1-43 ESL).

MR. ALAN WARD, staff planner, presented the case per the staff packet. He reviewed the applicant's request, and noted that the case had been continued from the August 6, 2003 meeting. He also noted that there was some confusion in the wording on page two of the staff report. Mr. Ward stated that the applicant's proposal of September 3, 2003 indicated that at the hearing on August 6, that the appellant's representative requested continuance of the case to September 3, 2003. He stated that staff would modify the report and eliminate the two sentences following September 3, 2003. Chair Vail stated that the changes would be prudent.

BOARD MEMBER WALSH indicated that she would appreciate a different way of stating the time frame for the history of the case. She asked for the date that City Council voted to approve the ESLO update and the date it

would have been legally in effect. She noted that it was her understanding that 30 days must pass before the update would go into effect.

MR. WARD replied that Board Member Walsh was correct, and that the City Council had voted on, and approved the ESLO update on April 1, 2003, with an effective date of May 1, 2003. He stated that the application for the building permit had been submitted on April 25, 2003.

BOARD MEMBER WALSH inquired whether staff had advised the applicants at the time of their submittal of the change in the ordinance. Mr. Ward replied that the applicant would have to respond to that question.

MR. WILLIAM MILLER, representing the applicant, addressed the Board. He presented a tape recording from August 7, 2003 concerning the builder's request to ascertain the position of staff as to the amended plans. (Portions of the recording were inaudible. Mr. Miller agreed to provide a transcript of the tape recording for the record.)

VICE CHAIR KUHSTOSS inquired as to the relevance of an August 7 event to the case at hand. Mr. Miller stated that the original application filed on April 25, 2003 was amended on August 7, 2003 to request a 26-foot height, which would have been approved pursuant to the old ordinance. Vice Chair Kuhstoss reminded Mr. Miller that the application permit had not been approved in April, that it had barely been submitted in April, and that anything that happened in August was not relevant to the situation at hand.

MR. MILLER went on to reassert the contention of the applicant that application made on April 25, 2003 was not subject to the new ESLO update. He cited ARS 1-224, Section 244, Article 3, Effective Statutes, which states that no statute is retroactive unless expressly declared so. He went on to state that City Council's vote on May 1 followed the applicant's permit date of April 25, 2003 and did not apply. Mr. Miller also noted that the applicant was now requesting a height of 26 feet instead of the original 28 feet.

VICE CHAIR KUHSTOSS asked if the applicant had an Arizona licensed architect at the time of the application. Mr. Miller replied in the affirmative. Vice Chair Kuhstoss then asked if the architect was ignorant of the ESLO changes. Mr. Miller responded that was not his understanding and that he understood the question to be one of constructive or actual notice.

BOARD MEMBER WALSH asked for clarification as to the previous experience of the architect and the builder in Scottsdale. Mr. Miller explained that the architect has had experience in Scottsdale, while this project represents the builder's first in Scottsdale.

(Chair Vail closed public testimony.)

MR. AND MRS. KHALAJ addressed the Board. Mr. Khalaj stated that he and his wife simply wanted to build their home, and that he had no prior knowledge of the 24-foot height restriction. Mr. Khalaj also stated that he had no desire to become involved in personality conflicts or in a political discussion with regard to his request.

(Chair Vail asked for Board Member discussion.)

BOARD MEMBER PERICA inquired of Ms. Villalpando whether the effective date of the application is when it is submitted or when the building permit is issued. Ms. Villalpando replied that it is at the time of the issuance of the building permit.

In response to a question by Chair Vail, Mr. Jones reviewed the timing for issuing a building permit. He stated that each case is unique, but that the expectation is a thirty-day turn around for first review. Chair Vail asked if the violation of the height restriction in the ESLO update was discovered at the time of the first review. Mr. Jones replied that it was.

VICE CHAIR KUHSTOSS commented that to allow the variance would be a violation of all four criteria. She stated that the applicant and his agents created the special circumstances. She also noted that everyone applying for a building permit after May 1, 2003 was subject to the same rights and privileges. She stated that authorizing the application would be detrimental to the City of Scottsdale in allowing a violation of the ESLO update.

CHAIR VAIL observed that in his opinion, all four criteria had been met. He referred to the timing of the passage of the ordinance, and to the fact that there was no possible potential visual impact to any of the neighboring properties due to the location of the proposed home.

BOARD MEMBER WALSH assured that applicant that this is not a political process and that all of the Board Members take their responsibility very seriously. She remarked that personal feelings are not a factor in any decision and that the Board strives to be objective in its consideration of all cases. Board Member Walsh agreed with Vice Chair Kuhstoss' assessment of the importance of ESLO by City Council and that it was critical to maintain the principles as updated. She maintained that the size and design of the house were created by the applicant and did not represent special circumstances. She referred to the timing and legal aspects of the case as well, and noted that it was the obligation of the architect to be well versed with the zoning requirements of any city he was

working in. She concluded by commenting that she had looked long and hard to find an answer for the applicant, and that she had been unable to find one.

BOARD MEMBER WALDMAN observed that the case presented a dilemma and that he had spent significant time visiting the site. He expressed disbelief that no one was aware of the vote that had been taken on the ordinance, but did agree that the height of the proposed home was within the character of the neighborhood and stated that he would support the variance.

BOARD MEMBER GORALSKI stated that it was her obligation to do what was required by law, and that, in Scottsdale, the building permit must be issued prior to the ordinance effective date. She noted that unfortunately, she could not support the request.

BOARD MEMBER PERICA concurred that the four criteria had not been satisfied and that she could not support the request for a variance.

VICE CHAIR KUHSTOSS moved to deny the application for the variance, as none of the four criteria had been met.

MS. VILLALPANDO suggested stating the case number and a more concise statement of the motion.

VICE CHAIR KUHSTOSS amended her motion and moved to deny the variance request for case number 6-BA-2003. Board Member Goralski seconded the motion. The motion passed by a vote of four (4) to three (3), with Chair Vail and Board Members Waldman and Sands dissenting.

CHAIR VAIL informed the applicant of the option to appeal to the Maricopa County Superior Court. He explained that staff could provide detailed information on the filing procedure.

ADJOURNMENT

With no further business to discuss, the regular meeting of the Scottsdale Board of Adjustment was adjourned at 7:37 PM.

Respectfully submitted,

"For the Record" Court Reporters